

Draft May 1, 2003

Assessment of Practicability of the Reduced Take Alternatives on Remand

Background

On May 13, 1999, the Fish and Wildlife Service (FWS or the Service) issued an incidental take permit (ITP) pursuant to Section 10 of the Endangered Species Act (ESA), 16 U.S.C. § 1539, to Winchester Creek Limited Partnership (WCLP). The ITP authorized incidental “take” of Delmarva fox squirrels (DFS) in connection with a residential development project in Queen Anne’s County, Maryland, known as the “Home Port Development.” The ITP was supported by a habitat conservation plan (HCP) dated May 11, 1999.

A lawsuit challenging issuance of the ITP was filed in federal district court in 1999. See Gerber v. Babbitt, No. Civ. A. 99-2374, 146 F. Supp.2d 1 (D. D.C.). Although the ITP was upheld in that litigation, an appeal was taken to the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) on certain issues. The relevant holding of the D.C. Circuit, for purposes of this document, is that issuance of the ITP violated Section 10 of the ESA because the Service failed to make an independent finding that the developer’s plan would, “to the maximum extent practicable, minimize and mitigate the impacts of such taking.” See 16 U.S.C. § 1539(a)(2)(B)(ii); Gerber v. Norton, 294 F.3d 173, 184-86 (D.C. Cir. 2002).¹ The court specifically held that, on the particular facts of this case, the Service should have made an independent finding that the “Reduced Impact Alternative” identified in the administrative record was impracticable. 294 F.3d at 185.

The D.C. Circuit remanded to the district court with instructions to remand to FWS for further proceedings. Id. at 186. To implement the remand, FWS has issued a Notice of Availability outlining this remand process (anticipated in May 2003), and has considered anew whether the Home Port HCP does, to the maximum extent practicable, minimize and mitigate the impacts of the incidental taking. Further, to satisfy the D.C. Circuit’s particular concerns in this case, FWS has conducted an independent analysis of the practicability of the Reduced Take Alternative identified in the HCP and the Reduced Impact Alternative identified in the EA. (Note: For simplicity, both of these will sometimes be referred to herein as the “Reduced Take Alternatives,” although the precise label and parameters of each differs between the HCP and Environmental Assessment (EA). They overlap in that the main feature of each is potential relocation of the entrance road.) The present document presents the Service’s initial analysis of this issue on remand. At the close of the public comment period, FWS will evaluate any comments received and issue a final remand decision document.

¹The other holding by the D.C. Circuit – relating to the need for public comment on a map identifying lands to be used as mitigation under the HCP – is addressed in the Service’s Notice of Availability (NOA), anticipated to be published in the Federal Register in May 2003.

While the Service believes it properly considered the ESA Section 10 criteria at the time of the original permit issuance, the Service herein seeks to supplement and enhance the documentation of those aspects of its Section 10 evaluation identified for remand. While much of the information discussed herein was known to FWS at the time of the permit's issuance, the Service did not prepare any documents which discussed or explained these issues in detail. A discussion of the constraints faced by the applicant that were present at the time of the original determination (1998) is presented first. In addition, there is a brief update of the facts related to the practicability of the Reduced Take Alternatives under current (2003) conditions. The Service believes the analysis herein demonstrates that the Reduced Take Alternatives were "impracticable" and that the "taking" was minimized and mitigated to the maximum extent practicable.

The ESA calls upon applicants to include in their HCP a discussion of the impacts that will result from the taking of the protected species due to their project, the steps they will take to minimize and mitigate such impacts, and alternative actions to such taking they considered and the reasons why those alternatives are not being used. See 16 U.S.C. § 1539(a)(2)(A)(i)-(iii). The Service, in evaluating a permit application, must also evaluate the impacts from the proposed incidental taking and whether the taking has been minimized and mitigated to the maximum extent practicable, but there is no requirement to consider alternatives to the proposed project. See 16 U.S.C. § 1539(a)(2)(B)(i)-(iii).

The interaction of the National Environmental Policy Act (NEPA) process, 42 U.S.C. §§ 4321 et seq., and the ESA can be clarified here for greater public understanding. NEPA requires federal agencies to consider alternatives to their actions before they take an action which may affect the environment. Since the issuance of a permit is a federal action, NEPA compliance procedures apply to the Incidental Take Permit (ITP) process. In order to save time and alleviate public confusion, the ESA and NEPA processes are often conducted concurrently. Therefore, under NEPA, the Service evaluated alternatives to the project proposed by the applicant, in an Environmental Assessment (EA). The agency may use the same alternatives which are presented by the applicant in its ITP application, develop other alternatives, or as was done here, modify the applicant's alternatives somewhat. NEPA does not require that the federal agency choose a particular alternative, only that it examine other alternatives to the proposed project.

In reviewing the initial application, the Service developed an extensive evaluation of the impacts which it presented in its "Determination of Anticipated Take Levels of the Delmarva Fox Squirrel, Homeport HCP". The Service concluded that the total take, converted into acres, anticipated from all sources of potential take was 58.3 acres. Since the applicant proposed to place a total of 66.08 acres, some off-site and some on-site, under protective easements, the Service determined that the project provided full mitigation. In fact, the applicant proposed more mitigation than was needed to be commensurate with the anticipated take. The Service also addressed a number of minimization measures. The value of minimization measures can be more difficult at times to quantify, but, the range of measures which the applicant included in his development included controls on pets, fenced yards, enclosed garbage containers (to reduce

attracting predators), restrictions on hunting, homeowner and visitor education, stop signs and speed limits, etc.

The principal focus of this document is analysis of the various minimization measures that the applicant considered and rejected, and providing a more detailed and independent evaluation of them than the Service provided before. The District Court found that the agency had properly complied with NEPA in its initial permit evaluation, see 146 F. Supp.2d at 5, and that finding was not addressed by the Court of Appeals. However, because the Court of Appeals cited the Reduced Impact Alternative in the Environmental Assessment, see 294 F. 3d at 185, we have included it here and will address the practicability of all elements presented by the Reduced Take Alternatives in both the HCP and Environmental Assessment in order to provide as complete and thorough an assessment as possible.

I. Description of Reduced Take Alternatives

The Reduced Take Alternative described in the HCP is presented below and focuses on two major elements: moving the entrance road and changing the placement and location of residential lots. This alternative was suggested by the applicant in the HCP. We also present the Reduced Impact Alternative that was described in the Environmental Assessment and contains two additional elements: changing the width of the road and using speed bumps. We have provided both Alternatives here and will address the practicability of all four elements considered by the two alternatives in order to provide the most thorough assessment of practicability possible.

A. Presentation of the Reduced Take Alternatives

1. Reduced Take Alternative (Habitat Conservation Plan at page 32)

“The reduced take alternative was considered as it relates to WCLP’s consideration to redesign the proposed project in order to alter, (a) the placement and design of the right-of-way road and, (b) placement and location of specific lots within the proposed project. This alternative might reduce take of DFS by providing an adequate buffer from the wood’s edge to existing structures within the lots to avoid human-caused disturbances. In addition, mortality and/or injury of DFS due to vehicular strike might be reduced. However, an ITP would still be necessary due to lack of any alternative available for the placement of the right-of-way road at the entrance of the development. This alternative was rejected because any alteration in design and/or placement of the road and lots stated above would entail reinitiating the Queen Anne’s County Planning and Zoning Department review as well as an additional public comment period. Because the proposed project plan has been in the development and approval process for some time, and this alteration in project design would entail a longer delay in the final approval of the development project, this alternative was determined to be impracticable.”

2. Reduced Impact Alternative (Environmental Assessment at page 5)

“Under the Reduced Impact Alternative, the Service requested a modification to the applicants’ design plan which would provide for a relocation (or shift) of the right-of-way entrance road (Home Port Drive) away from the DFS forested edge habitat and the placement of speed bumps to ensure compliance to the 15 mph speed limit. Additional modifications to the plan would include a reduction in road surface width and the number of housing units and/or relocation of housing lot(s) to be developed outside of the 150' Conservation Easement area. This alternative would reduce the likelihood of take of DFS by unavoidable human disturbance. Additionally, the shift of the right-of-way road away from the forest edge (property line) could reduce the number of DFS killed by vehicles.

B. Description of the four elements in the Reduced Take Alternatives and their relative influence on reducing the take of DFS

The following discussion attempts to quantify the relative reduction of impacts from each of the four elements using the information provided in the Environmental Assessment (pages 7 and 8 of Appendix A to the Environmental Assessment, Determination of Anticipated Take, May 11, 1998).

1. Change in location of road (Element 1) - The “existing road plan” is the road location as it stands today (April 2003), and this reflects the original farm road used to access the property before it was purchased for a subdivision (see map, Attachment A). The “alternative road plan” begins at the same point but curves to the west, placing the road further from the woods to the east. The starting point of the road is the only point on the Home Port parcel that accesses the County road leading to the property. The property immediately east of this point is owned by another landowner who was not willing to sell (Attachment B, Mr. Waterman’s communication dated September 18th, 2002). Thus, the starting point of the entrance road must occur as mapped.

Habitat that is within 150' of a road is considered to be degraded. The alternative road alignment reduces the amount of habitat degradation in the woods to the east (from 3.96 acres to 1.10 acres). However, the alternative alignment adds habitat degradation in the woods to west (0.4 acres), and the alternative alignment does not change the 0.78 acres of habitat degradation that occurs at the entrance point of the property. Thus, while the alternative road plan reduces the total amount of habitat degradation by 2.5 acres, the degradation of the woods on either side of the entrance point of the road would occur under either road location. The woods at this entrance point form a corridor that Delmarva fox squirrels (DFS) are most likely to use as they cross the road, and this location is where most road-kills would be expected. Thus, the alternative road location would not be expected to have a substantial impact on the number of DFS anticipated to be struck by vehicles. In summary, the alternative road location would have reduced the acres of habitat degraded by the road by approximately 2.5 acres, but would not have *eliminated* all habitat degradation associated with the road, and the risk of roadkill at the entrance point would have remained the same.

2. Change in width of road (Element 2) - Changing the width of the road right-of-way from 70' to 50' results in a reduction of 0.5 acres of habitat degradation.

3. Change in number and/or location of homes (Element 3) - Habitat that is within 150' of a residential home is considered degraded. Of the 13 lots where homes degraded habitat, the average acres degraded was 0.24 acres/lot. Thus, on average, reduction of one lot would yield approximately 0.24 acres less degradation, 2 lots would yield 0.48, etc. Similarly, if any home could be moved beyond the 150' distance from the woods, it would have reduced the amount of habitat degradation by the home by 0.24 acres on average.

4. Installation of speed bumps (Element 4) - The effectiveness of speed bumps on the reduction of take of DFS cannot be quantified, but they would be expected to ensure lower driving speeds and make some reduction in risk of road-kill on the entrance road.

To summarize, the four elements of the two Reduced Take Alternatives include moving the location of the entrance road, changing the width of the road, changing the number and/or location of homes, and the use of speed bumps. The change in the location of the road would reduce the area of habitat degradation by 2.5 acres and thus would have the greatest effect on reducing take of DFS among these four elements. This is a feature of both alternatives. Facts related to the practicability of each of the four elements in the Reduced Take Alternatives are presented below.

II. Practicability of Reduced Take Alternatives on Remand

The following information describes constraints on the elements described above from the Reduced Take Alternatives. Much of this information was known at the time of the initial assessment of the reduced take alternative, however, it was not recorded in detail in Service documents. Additional information has been obtained by the Service or has been provided by the applicant for this remand.

A. Facts related to Practicability of Element 1 - Changing the Road Location

1. County Regulations and growth allocation

The alternative road plan would have made a major difference to Queen Anne's County as it implemented the Critical Areas laws. All but a few acres of the Home Port Development are subject to Maryland's Critical Areas Law. The following explains in greater detail the calculation and management of growth allocation in the Critical Area under Maryland law.

Background on The Maryland Critical Area Program, - - Maryland's Critical Area Laws were established in 1988 and give special emphasis to managing land use in sensitive coastal areas. The laws apply to the area within 1000' of mean high tide and are implemented primarily through the County Programs. Queen Anne's County adopted its Critical Area Program in 1989 with the

stated objective to “accommodate growth while protecting the water quality and conserving habitat areas in the Critical Area. The Chesapeake Bay Critical Area Ordinances regulate development activities and resource utilization activities, e.g., agriculture and forestry, in the Critical Area.” (Attachment C, Queen Anne’s County Critical Area Program, page 1) .

The program started with mapping the land use within the Critical Area using the following classifications:

- Intensely Developed Area (IDA) - any area of 20 acres or more where residential, commercial, institutional and/or industrial development is predominant and relatively little natural habitat occurs. IDA’s also have housing density equal to or greater than four dwelling units per acre;
- Limited Development Area (LDA) - any area developed in low or moderate intensity uses that also contain areas of natural plant and wildlife habitat; housing density between one unit per five acres and IDA density;
- Resource Conservation Areas (RCA) - areas predominated by wetlands, forests, and forestry activities, abandoned fields, agriculture, fishery activities, or agriculture. Housing density of RCA’s is not more than one unit per 20 acres.

Management of new development in areas mapped as RCA is controlled through Growth Allocation. The area of new development that will be allowed in RCA’s is 5% of the County’s total RCA areas, less State tidal wetlands and federally owned lands (Attachment C, Queen Anne’s County Critical Area Program, page 15). In Queen Anne’s County, this area equals 1,528 acres. However, subtracting growth allocation that was already mapped, awarded, or planned for by several municipalities, there were 339 acres available in a general pool at the time the Development was being planned (page 23, Attachment C). This was the total acres of RCA land that could ever be developed. Thus, County Commissioners view this growth allocation as very precious (page 23, Attachment C) and must use it wisely in coordination with local municipalities and the County Comprehensive Plan as they will not be allowed to permit development of any more RCA land once this allocation has been used.

Under the Queen Anne’s Critical Area Program, development that is planned in any RCA area is encouraged to retain at least one 20-acre area that remains outside the development envelope (area of homes and roads) and in RCA status (Attachment C, page 21). This area cannot include required buffers along the waters edge, and cannot have any roads within it, although it can have one house. If the developer can retain a 20-acre RCA area on the project site, then the required growth allocation will equal only the area of the development envelope (area of homes and roads). If they cannot retain a 20-acre RCA area, then the growth allocation needed will equal the acreage of the entire parcel that is being developed.

Queen Anne County Critical Area Program and the Home Port Subdivision - In the current Home Port subdivision plan, Lot 16 is 21.5 acres in size and provides the needed 20-acre parcel of RCA . The alternative road right-of-way would have bisected Lot 16 into two smaller units each less than 20 acres. This would more than double the amount of growth allocation required for

this project from the 21.47 acres of growth allocation using the existing road plan, to approximately 51.5 acres using the “alternative” road plan.

The applicant was instructed by the County Planning Commission to reduce the growth allocation needed for this project to the maximum extent. In the Queen Anne’s County Planning Commission Minutes, January 9, 1997 (Attachment D, page 9) the Planning Commission reviewed the sketch plan for the subdivision and concluded with the following motion:

“RESOLVED that the request of Winchester Creek Limited Partnership for concept plan approval (SSP 05-96-05) for a proposed 15 lot subdivision with three (3) separate open space parcels to be served by a public road on 56.6 acres of land owned by the applicant - known as Hissey farm is conditionally approved subject to the following conditions: (1) the applicant shall improve the internal road design of the subdivision in accordance with suggestions from the Department of Planning And Zoning, (2) reduce the width of the proposed road to 50', (3) provide a 100' shore buffer, but “expand” the buffer through the use of a 200' “conservation area” on the proposed lots where the depth of the lots permit reasonable development or provide a 150' shore buffer for any lots that do not have property lines to the mean high water line, (4) **consult with the Department to find all means by which the acreage of growth allocation may be reduced.**”(emphasis added).

A staff report from the Development Review Chief to the Planning Commission Members, dated February 13, 1997 (Attachment E), recommends that sketch plan approval is appropriate and one of the reasons stated is as follows:

“Staff believes the applicant has diligently responded to the directive that the amount of growth allocation necessary be reduced. The current plan is the third design submitted for the preparation of the petition for growth allocation:

1 st plan (11-07-96)	32.339 acres of growth allocation needed
2 nd plan (12-13-96)	27.919 acres of growth allocation needed
3 rd plan (1-21-97)	26.553 acres of growth allocation needed

From the initial application and design, the applicant has reduced the amount of requested growth allocation by 5.886 acres.” (Attachment E, page3).

2. Time delays and costs associated with a re-design of the road

The applicant has estimated the following costs and time requirements associated with re-designing the road. (Attachment B, Correspondence from Mr. Waterman dated September 18, 2002).

- a. Engineering fees to redesign the road and sewer system to a new location would cost approximately \$6,800 and would necessitate a complete new review by the County Planning Commission, the Maryland Critical Areas Commission, and a New Growth

Allocation Hearing before the County Commissioners;

- b. A new Concept Plan would be needed prior to re-applying for Growth Allocation. (engineering cost estimate \$2,800; four months' time);
- c. New Growth Allocation hearings would be required (engineering cost estimate \$5,800; one year's time);
- d. A new Preliminary Plan would be required if Growth Allocation were approved. (engineering cost estimate \$2,500; four to six months' time);
- e. Lastly, a new Final Plat. (engineering cost estimate \$1,500; two months' time).

Together these total \$19,400 and a 22 to 24 month delay. In addition, the applicant indicates that the interest on invested money would exceed \$50,000 annually or approximately \$100,000. The estimates appear reasonable. New applications would also void the original approvals and, therefore, the applicant would run the risk of having no project at all. In addition, since the local actions were challenged by the named plaintiff, Mr. Gerber, who resides adjacent to Home Port, the amount of time that other possible litigation may take is uncertain.

The applicant's one-year time estimate for the reviews and final approval of Growth Allocation (step "c" above) is consistent with the time that these reviews required for the existing plan. Attachment F lists the dates of these reviews as they were summarized in a Resolution made by County Commissioners on April 14, 1998. The cost estimates also appear to be reasonably determined.

B. Facts related to Practicability of Element 2 - Changing Road Width

The applicant submitted a concept plan for this 15 lot development to the County in November 1996 and indicated his intent to seek growth allocation. The reactions of the Planning Commission to the plan are recorded in the minutes of their January 9, 1997 meeting (Attachment D). Many aspects of the plan were discussed including reducing the width of the right-of-way from 70' to 50'. The following are excerpts of the discussion.

"Mr. McDonnell indicated that the Department of Planning and Zoning would cooperate with the applicant to seek a reduction in the 70' wide right-of-way presently proposed. Once again, he had explained that the Department of Public Works insists that the road width be 70' on the basis of standards in the County Roads Ordinance. He felt that a 50' right-of-way for this subdivision would be more appropriate as it would reduce net buildable area, impervious surfaces, and very likely reduce the required acreage for growth allocation." Upon review and further discussion, the following motion was made by Mr. Seward, seconded by Mr. Pusey and passed by voice vote: (Attachment D, pages 5-6)

RESOLVED that the request of Winchester Creek Limited Partnership for concept plan approval (SSP 05-96-05) for a proposed 15 lot subdivision with three (3) separate open space parcels to be served by a public road on 56.6 acres of land owned by the applicant - known as Hissey farm is conditionally approved subject to the following conditions: (1) the applicant shall improve the internal road design of the subdivision in accordance with suggestions from the Department of Planning And Zoning, (2) **reduce the width of the proposed road to 50'**(emphasis added), (3) provide a 100' shore buffer, but "expand" the buffer through the use of a 200' "conservation area" on the proposed lots where the depth of the lots permit reasonable development or provide a 150' shore buffer for any lots that do not have property lines to the mean high water line, (4) consult with the Department to find all means by which the acreage of growth allocation may be reduced," (Attachment D, page 9)

The Department of Public Works approved the reduction to a 50' road right-of-way . The Department of Public Works has since changed its requirements and now has a 50' minimum right-of-way requirement (Subdivision Design and Construction Standards for the Roads Division of the Dept. of Public Works of Queen Anne's County, MD 2003).

C. Facts related to Practicability of Element 3 - Reducing the Number and/or location of Lots

1. Costs/benefits of reducing number of lots - Lot 16 is the large 21.5 acre lot that is essential to enabling the lower request for growth allocation, a factor that is critical to maintaining County approval for the project. Of the remaining 15 lots, elimination of any one lot that caused some degradation would on average reduce the amount of habitat degradation from homes by only 0.24 acres.

The applicant has stated that in developing many concepts for development of the property, he has reduced the potential yield from the 27 buildable lots allowed under zoning, to 22, and later to 16 lots. Reduction of lot 16 would have jeopardized the feasibility of the entire project because of its role in reducing growth allocation requirements, and because its large size will result in the larger revenue from its sale. The applicant anticipated the remaining 15 lots would be sold at a price estimated by the price of waterfront lots sold in the Grasonville area in 1998. (Attachment G, Correspondence dated February 10, 2003). Costs of this development were already determined by the initial cost of the land, and the infrastructure for the development such as roads and sewer. Further reduction in the number of the lots that could be sold would likely require the applicant to raise the costs on the remaining lots in order to cover the initial costs of the development. Raising costs on these lots would reduce the applicant's ability to compete in the Grasonville housing market, and therefore jeopardize the feasibility of the project.

2. Moving building pads within lots - There is little room to move the building pads further away from the woods than they already are and still maintain the same size building pads and the

required minimum distance to the street and side property lines. The current plan places the front of the building pads on lots 1-3 and 11-15 only 50 feet away from the road, which is the minimum distance allowed under estate zoning (Attachment H, Code of Queen Anne's County, Title 18, Section 18-1-040). Lots 4-7 are and lot 10 are "pie-shaped" with a narrow front yard that makes it impossible to move these up any closer to the road and still maintain the same size building pad because of restrictions on distances to the side property lines. Lot 9 is very close to the community pier and moving this building pad closer to the road will place it along the path to the community pier. Individual lot owners may choose to place all construction as close to the front as possible and may not have their home right at the back line of the building pad. However, placing them a few feet closer than is currently planned would not significantly change the impact to DFS.

3. Time and costs associated with re-design of the development - If the applicant were to re-submit for a new Plat with changes in the number of lots and/or placement of homes, (but not a new road location) he would have to go through the County process again. Very minor changes could be processed within two months through an amendment process. However, substantial redesign of the subdivision would require repeating the County process and requiring a total of \$12,600 and 22 to 24 months as discussed above. In addition the applicant indicates that the interest on invested money would exceed \$50,000 annually or approximately \$100,000. New applications would also void the original approvals and, therefore, the applicant would run the risk of having no project at all.

D. Facts related to Practicability of Element 4, Installation of Speed Bumps

Placement of speed bumps to help enforce lower speeds was also considered. The Service supported this measure, and the applicant approached the County to obtain permission to install them. However the Queen Anne's County Department of Public Works would not permit the installation of speed bumps (Attachment I, page 7). Other minimization measures were provided instead to help lower speeds and reduce potential take of DFS. These include a posted 15 mph speed limit, signs along the entrance road which notify the drivers of DFS presence, public education, and mowing along the side of the road to increase visibility of DFS.

E. Summary and Conclusion as to Practicability of the Reduced Take Alternatives

After consideration of the facts related to the practicability of the Reduced Take Alternative, the Service finds that neither of the Reduced Take Alternatives is practicable because the alternative road location more than doubles the growth allocation needed for the project. Given the importance of minimizing this requirement, the larger growth allocation would very likely not be approved by the County. In other words, because of the County process, this project, in all probability, could not have gone forward with the alternative road location. This fact alone makes the alternative impracticable. Further, the other measures, that offer less minimization of impacts, are also impracticable. Further reduction of road width below 50' is not reasonable given that the applicant had already reduced the width from 70' to 50', and 50' is the narrowest width allowed by

the Queen Anne's County Department of Public Works. Reduction of the number of homes or lots at this subdivision had already occurred through the County process. Further reductions would require substantial costs and additional time delays, and would only produce very small amounts of improvements on the acreage degraded by homes. The use of speed bumps is similarly not feasible as it was rejected by the Queen Anne's County Department of Public Works.

Since the measures described in the reduced take alternatives were not practicable, FWS asked for appropriate minimization measures to reduce the speed of vehicles on the entrance road and reduce the likelihood of DFS deaths from vehicle strikes. For example, FWS recommended lowering speed limits to 15 mph, mowing an area along the road to maintain visibility of any DFS along the road, placing signs along the road and providing information to residents. WCLP agreed to these minimizing measures. WCLP also is mitigating for the impacts of the road by placing 31.4 acres of DFS habitat off-site in a permanent conservation easement. The property is located along Sportsmens' Neck Road. A map of this property is being concurrently made available for public comment. In addition, WCLP is placing 34.68 acres on-site under conservation easement and afforesting (planting trees) on 4.5 acres which will result in DFS habitat over time.

Thus, in its entirety, as well as measure by measure, the Service's independent analysis concludes that the reduced take alternatives are not practicable, because the County would not approve this project with the alternative road location. The Service believes that the impracticability of the road realignment itself is dispositive of the practicability issue. In addition, the proposed alternative would not result in significantly greater ecological benefit to the species. The wooded corridor at the entrance point is where DFS are most likely to be crossing the road and where the risk of vehicle strikes is highest. This location remains the same under either road alternative; thus the degradation around the entrance point and the risk of vehicle strike is not reduced by this alternative. In addition, the difference in acreage of degraded habitat was fully mitigated (providing 66.08 acres of mitigation for 58.3 acres of impacts) through various means, including permanent habitat protection enacted through the habitat conservation plan.

The Service believes that the applicant satisfied the original application criteria regarding "alternatives" by specifying "reasons" why the alternative was not selected. See 16 U.S.C. § 1539(a)(2)(A)(iii). However, much of the Service's recognition of the difficulty and delay in obtaining local approval for a road relocation or subdivision redesign was based upon its understanding of local laws and was not itemized in detail in the administrative record. In response to the remand order, the Service has performed an extremely detailed examination of the information provided to it during the original application period, as well as information it has independently gathered and some provided from the Permittee subsequent to the remand order.

In conclusion, this second and expanded review affirms the Service's original determination that the applicant satisfied the application criteria under § 10(a)(2)(A)(iii), and that issuance of the ITP was consistent with ESA § 10(a)(2)(B)(ii), 16 U.S.C. § 1539(a)(2)(B)(ii).

III. Update of Facts related to practicability of Reduced Take Alternatives under January 2003 conditions .

A. Update of facts related to practicability of moving the road under January 2003 conditions

Since the Service's original assessment of the practicability of moving the road, (at the time of ITP issuance in 1999) the Critical Areas rules have not changed and the calculation of growth allowance is the same. While a complete redesign of the project road may be theoretically possible, County approval is still not viewed as possible due to the need for additional growth allocation for the alternative road alignment. WCLP inquired about costs estimates from the engineering firm and estimated that approximately \$19,400 in engineering costs alone would be necessary to start over, and 22 to 24 months would be necessary to go through the county process. Annual cost of interest on the investment were estimated at \$50,000, resulting in a loss of \$100,000 for a two year delay. These estimates appear to have been reasonably drawn.

The Service's assessment of the local situation is that the current Commissioners would be even less likely to allow the project to go forward if it required the additional Growth Allocation. In September of 2002, Queen Anne's County elected five new County Commissioners, all of whom stated their concern about high development rates and a need to preserve the rural character and natural resources of the county. All of the previous commissioners lost their re-election attempts. There is a substantial anti-development movement that has resulted in a recent 6 month moratorium on development, and there are several non-profit organizations that are actively advocating concern about development (www.savekentisland.org).

Additionally, the alternative road location would now require clearing and bisecting the afforestation area, and degrading it by placement of the road. It would reduce the amount of habitat degradation along the woods to the east by approximately 2.86 acres (3.96-1.1), but add 0.4 acres of degradation to the woods to the west and an additional 0.83 acres of degradation to the afforestation area. The degradation of the woods at the entrance point would remain the same.

B. Update of facts related to practicability of reducing the road width under January 2003 conditions

The current road is paved and using the 50' width. The Dept. of Public Works of Queen Anne's County Maryland now states in its January 2003 Roads Design and Construction Standards Manual that the minimum right-of-way widths for Rural Roads and Minor Residential Streets is 50'. Secondary and primary residential streets should be 60' wide. Further reduction of the road right-of-way to 30' does not seem practicable given the minimum width provided in the current standards is 50'.

C. Update of Facts related to practicability of reducing the number of lots under January 2003 conditions

Not all the lots have been sold. However, overall costs of the project have gone up since 1998 as the costs of carrying the land by the developer have continued and legal fees for this law suit have continued. Reduction of profits now would require higher prices on remaining lots which will make it difficult for the applicant to compete in the Grasonville housing market, jeopardizing the economic feasibility of the project

D. Update of facts related to practicability of installing speed bumps under January 2003 conditions

Road design standards remain the same in 2003. Speed bumps require cars to essentially come to a stop and are not likely to be approved for this entrance road. The County's preferences against using speed bumps generally comes from concerns about emergency vehicles.

E. Conclusion of practicability of reduced take alternative under January 2003 conditions

To summarize, since the Service's original assessment of the practicability of moving the road, the Critical Areas rules have not changed and the calculation of Growth Allowance is the same. The Service's assessment of the local situation is that the current Commissioners would not allow the project to go forward if it required the additional Growth Allocation. Additionally, the alternative road location would now require clearing and bisecting the afforestation area. This would add to the area of habitat degradation along the western forested habitat and destroy habitat that would develop over time in the afforestation area. Under the conditions of April 2003, FWS would consider the reduced take alternative to be impracticable and unreasonable.

List of Attachments

Attachment A - Map 1. Location of existing and alternative road right-of-ways considered at Home Port subdivision in Queen Anne's County, Maryland.

Attachment B - Correspondence by Mr. Waterman dated September 18th, 2002.

Attachment C - Queen Anne's County Chesapeake Bay Critical Area Program - Refinements Effective - November 18, 1997

Attachment D - Queen Anne's County Planning Commission Minutes - January 9, 1997.

Attachment E - Memo to Planning Commission Members, from Mark McDonnell, AICP, Development Review Chief, February 13, 1997.

Attachment F - Resolutions made by County Commissioners on April 14, 1998, documenting the length of time between applicants submission of concept (or sketch) plans and approval of Growth Allocation at the County Level.

Attachment G - Correspondence from Mr. Waterman dated February 10, 2003.

Attachment H - Queen Anne's County Code, Title 18. Land Use and Development. Section 18-1-040.

Attachment I - Queen Anne's County Planning Commission Minutes - February 13, 1997.